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The Cross-Fertilization of Principles Relating to Procedure and Remedies in the Jurisprudence of International Courts and Tribunals

CHESTER BROWN*

I. INTRODUCTION

It is undeniable that the multiplication of international judicial bodies, which led to the creation of the Project on International Courts and Tribunals (PICT) in 1997,¹ has had implications for the international legal order. The “proliferation” of international courts and tribunals might be regarded as a positive development in that it evidences a trend toward the peaceful settlement of disputes, and away from non-peaceful means of regulating differences. This increase in courts, however, has not come without complications.

As is well known, the growth in the number of international courts has occurred in the absence of an overarching framework: there are no formal links between different international courts, and there is no structural hierarchy within which they operate.²

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1. See PICT Home Page, <http://www.pict-pcti.org> (last visited Nov. 17, 2008).

2. See PICT Research Themes: System Issues, http://www.pict-pcti.org/research/systemic_issues.html.

This means that international tribunals essentially operate in isolation from each other. This led the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) to observe in its *Prosecutor v. Tadic* decision:

International law, because it lacks a centralised structure, does not provide for an integrated judicial system operating an orderly division of labour among a number of tribunals, where certain aspects or components of jurisdiction as a power could be centralised or vested in one of them but not the others. In international law, every tribunal is a self-contained system (unless otherwise provided).³

The proliferation of these so-called “self-contained systems” has had various problematic effects on the administration of international justice. One problem is the “fragmentation” of international law through the emergence of doctrinal inconsistencies.⁴ In addition, the proliferation creates overlapping jurisdictions among different international courts, giving rise to the problem of parallel competing proceedings concerning the same dispute.⁵ Indeed, concerns have been expressed about the fragmentation of international law, on which proliferation may have had an exacerbating effect.⁶ Both of these issues have been

3. *Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 11 (Oct. 2, 1995), reprinted in 35 I.L.M. 32, 39 (1996).

4. See Jonathan Charney, *The Impact on the International Legal System of the Growth of International Courts and Tribunals*, 31 N.Y.U. J. INT'L L. & POL. 697 (1999); Jonathan Charney, *Is International Law Threatened by Multiple International Tribunals?*, 271 RECUEIL DES COURS 101 (1998) [hereinafter Charney, *Multiple International Tribunals*].

5. See generally YUVAL SHANY, *THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS* (2003); Rüdiger Wolfrum, *Kokurrierende Zuständigkeiten Internationaler Streitentscheidungsinstanzen: Notwendigkeit für Lösungsmöglichkeiten und deren Grenzen*, in LIBER AMICORUM JUDGE SHIGERU ODA 651 (Nisuke Ando et al. eds. 2002); Vaughan Lowe, *Overlapping Jurisdiction in International Tribunals*, 20 AUSTL. Y.B OF INT'L L. 191 (1999).

6. See, e.g., Gerhard Hafner, *Risks Ensuing from the Fragmentation of International Law*, in INT'L LAW COMM'N, *Work of its Fifty-Second Session*, ¶ 143, U.N. Doc. A/55/10; Gerhard Hafner, *Pros and Cons Ensuing from Fragmentation of International Law*, 25 MICH. J. INT'L L. 849 (2004). For the International Law Commission's Final Report on Fragmentation, see Int'l Law Comm'n, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006). See also Chester Brown, *The Proliferation of International Courts and Tribunals: Finding Your Way Through the Maze*, 3 MELB. J. INT'L L. 453 (2002); Martti Koskeniemi & Paivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 LEIDEN J. INT'L L. 553 (2002); Sir Robert Jennings, *The Role of*

the subject of careful attention by writers, and it is not the purpose of this article to revisit these questions.

This article is intended to address the issue of whether proliferation leads to emerging common approaches to questions of procedure and remedies in the jurisprudence of international judicial bodies, and, if so, why this is occurring. It is by no means certain that different international courts and tribunals will adopt consistent approaches to such issues. Indeed, in light of concerns expressed about the fragmentation of international law, the multiplication of international courts and tribunals could conceivably lead to the atomization of these legal categories.

If, however, international judicial bodies adopt consistent approaches to questions of procedure and remedies, this indicates that international courts do not necessarily operate as “self-contained systems,” as stated by the Appeals Chamber of the ICTY.⁷ This instead suggests that the proliferation of international courts and tribunals has contributed to the emergence of what might be described as an international judicial system. Where common approaches on these issues emerge, it is arguable that this field of international law is not fragmenting by the rise in the number of international jurisdictions. Rather, it is developing in a relatively coherent and consistent manner.

II. EMERGENCE OF COMMON APPROACHES BY INTERNATIONAL COURTS AND TRIBUNALS

A review of the practice of international courts and tribunals on a range of issues relating to procedure and remedies reveals evidence suggesting that there is a tendency, or at least an instinct, on the part of international courts and tribunals to adopt common approaches. These universal approaches have led to increasing commonality in the case law of international courts. This commonality concerns both the existence of procedural and remedial powers and the manner in which those powers are

the International Court of Justice, 68 BRITISH Y.B. INT'L L. 1, 60 (1997); Gilbert Guillaume, *The Future of International Judicial Institutions*, 44 INT'L & COMP. L.Q. 848 (1995).

7. *Tadic*, Case No. IT-94-1-AR72 ¶ 11.

exercised. The practice has given rise to the emergence of what might be called a "common law of international adjudication."⁸

The emergence of commonalities is significant because it was unclear whether the proliferation of international tribunals would give rise to the convergence in their approach to procedure and remedies. Moreover, there was the potential for the emergence of inconsistent approaches to result, because international courts and tribunals derive their jurisdiction and competence from their own constitutive instruments and rules of procedure that are not expressed in identical terms. Further, different international tribunals have different functions, which could lead to variations in approach. Nonetheless, the case law of international courts and tribunals reveals convergent rather than divergent practices on these issues. It demonstrates that while international courts seek to apply the provisions of their statutes and rules of procedure, these instruments do not foresee every procedural issue that may arise in the course of international proceedings. Additionally, most are silent on the nature of the remedies that can be awarded. Where *lacunae* exist in these instruments and where their provisions might be interpreted and applied in various ways, international courts often turn for guidance to the practice of other international tribunals, and many examples can be cited to illustrate this.

Before citing a number of these examples, it should be noted that it is not possible in this article to conduct an exhaustive review of the practices of the many international judicial bodies on all issues of procedure and remedies. A more extensive analysis is contained in *A Common Law of International Adjudication*, with particular focus on the sources of law relating to procedure and remedies, aspects of evidence, the power to grant provisional measures, the power to interpret and revise judgments and awards, and the availability of remedies.⁹ Nonetheless, the following paragraphs demonstrate the existence of a significant level of cross-fertilization of principles among different international courts on various issues.

A first notable example is provided by an early decision of the Appellate Body of the World Trade Organization (WTO) in the *European Communities—Regime for the Importation, Sale and*

8. CHESTER BROWN, *A COMMON LAW OF INTERNATIONAL ADJUDICATION* (2007) [hereinafter BROWN, *A COMMON LAW*].

9. See generally *id.*

Distribution of Bananas dispute.¹⁰ In its Report, the WTO Appellate Body referred to the practice of other international tribunals in holding that a party to WTO dispute settlement proceedings may be represented by private lawyers. It stated:

We can find nothing in the Marrakesh Agreement Establishing the World Trade Organization (the “WTO Agreement”), the DSU or the Working Procedures, nor in customary international law or the prevailing practice of international tribunals, which prevents a WTO Member from determining the composition of its delegation in Appellate Body proceedings.¹¹

This statement by the WTO Appellate Body differs from the dictum of the ICTY Appeals Chamber in *Prosecutor v Tadic*. There, the ICTY Appeals Chamber observed that international courts and tribunals were all “self-contained systems” unless there was agreement to the contrary.¹² In comparison, the WTO Appellate Body deemed it appropriate to consider the practice of other international courts and tribunals in resolving a procedural issue for which no provision was made in the WTO Dispute Settlement Understanding (DSU) or the Working Procedures for Appellate Review.¹³

A second instance, also found in the early case law of the WTO Appellate Body, is in *US—Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, one of the first WTO disputes.¹⁴ In that report, the WTO Appellate Body referred to, and adopted, the practice of the International Court of Justice (ICJ) and other international tribunals concerning the rule on the allocation of the burden of proof, stating:

[V]arious international tribunals, including the International Court of Justice, have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the

10. Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (Sept. 9, 1997).

11. *Id.* at 10.

12. *Tadic*, Case No. IT-94-1-AR72 ¶ 11.

13. Understanding on Rules and Procedures Governing the Settlement of Disputes, opened for signature Apr. 15, 1994, 1869 U.N.T.S. 401, art. 1(2) (entered into force Jan. 1, 1995); Working Procedures for Appellate Review, Annex C, WT/AB/WP/W/9 (Oct. 7, 2004).

14. Appellate Body Report, *U.S.—Shirts and Blouses*, WT/DS33/AB/R (Apr. 25, 1997).

claimant or the respondent, is responsible for providing proof thereof. Also, it is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence.¹⁵

Third, in *Ram International Industries v. Air Force of Iran*, the Iran-United States Claims Tribunal evaluated the ability of the Tribunal to exercise the power of revision. Revision is the power to reopen a decision or award in light of the discovery of new evidence that is likely to be a decisive factor.¹⁶ It can only be exercised when new, previously unknown, and relevant evidence is introduced, and the party claimed revision at the time of judgment.¹⁷ Various constitutive instruments confer the power of revision. These include the Statute of the ICJ,¹⁸ the Convention on the Settlement of Investment Disputes between States and Nationals of other States,¹⁹ and the Rules of Procedure of the International Tribunal for the Law of the Sea (ITLOS).²⁰ In contrast, the power of revision is not conferred by the UNCITRAL Rules, which govern the proceedings before the Iran-United States Claims Tribunal, albeit in slightly modified form.²¹ In

15. *Id.* at 14. See also Panel Report, *Turkey—Textiles*, WT/DS34/R (Nov. 19, 1999); Panel Report, *Argentina—Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, 1158-9, WT/DS56/R (Nov. 25, 1997); Panel Report, *U.S.—Shirts and Blouses*, WT/DS33/R (Jan. 6, 1997); Panel Report, *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products—Complaint of the United States*, 80, WT/DS50/R (Sept. 5, 1997); Appellate Body Report, *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products—Complaint of the United States*, ¶ 16, WT/DS50/AB/R (Jan. 16, 1998); Appellate Body Report, *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, ¶ 87, 88, 104-105 WT/DS246/AB/R (Apr. 7, 2004) [hereinafter *EC-Tariff Preferences*].

16. MICHAEL REISMAN, NULLITY AND REVISION 208-12 (1971).

17. See, e.g., BROWN, A COMMON LAW, *supra* note 8, at 156-8; Robin Geiss, *Revision Proceedings Before the International Court of Justice*, 63 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 167 (2003); REISMAN, *supra* note 16 at 208-12; J.L. SIMPSON & HAZEL FOX, INTERNATIONAL ARBITRATION 242-45 (1959).

18. Statute of the International Court of Justice art. 61, June 26, 1945, 59 Stat. 1055 [hereinafter ICJ Statute].

19. Convention for the Settlement of Investment Disputes Between States and Nationals of Other States art. 51(1), Mar. 18, 1965, 575 U.N.T.S. 159 (entered into force Oct. 14, 1966).

20. International Tribunal for the Law of the Sea [ITLOS] Rules of Procedure, art. 179.

21. See generally UNCITRAL Arbitration Rules, 31 UN GAOR, Supp. No. 17, U.N. DOC. A/31/17 (1976).

its award in *Ram International Industries*, the Iran-United States Claims Tribunal reviewed the practice of the ICJ, arbitral tribunals, the United States-Mexico Claims Commission, and the writings of publicists.²² The tribunal then held that despite the absence of a power of revision in its Rules, an arbitral tribunal constituting a large number of disputes may have the power to reopen a case for new evidence if the original decision was induced by fraud.²³

On a similar point, a decision by the Inter-American Court of Human Rights (IACHR) presents a fourth relevant example. In *Genie Lacayo v. Nicaragua*, the IACHR held in unequivocal terms that it has the power of revision, despite the absence of any such power in the IACHR Statute or its rules of procedure.²⁴ It held:

As stipulated in the Statute of the International Court of Justice and the Rules of the European Court, pursuant to the general principles of both domestic and international procedural law, and, in accordance with the criterion of generally accepted doctrine, the decisive or unappealable character of a judgment is not incompatible with the existence of the remedy of revision in some special cases.²⁵

Fifth, in *Mamatkulov and Abdurasulovic v. Turkey*, the European Court of Human Rights (ECHR) dealt with whether the provisional measures granted under its Rules of Court were binding.²⁶ In its judgment, the ECHR made extensive references to the judgment of the ICJ in *LaGrand*, in which the ICJ had held that its provisional measures had binding force.²⁷ The ECHR also cited the practice of the IACHR, the UN Human Rights Committee, and the Committee Against Torture.²⁸ In a telling passage, the ECHR observed:

22. *Ram Int'l Indus., Inc. v. Air Force of Iran*, 29 Iran-U.S. Cl. Trib. Rep. 383, 389 (1993).

23. *Id.* at 390.

24. *Genie-Lacayo v. Nicaragua*, 1997 Inter-Am. Ct. H.R. (ser. C), No. 45, ¶ 6 (Sept. 13, 1997).

25. *Id.* ¶ 9.

26. *Mamatkulov & Abdurasulovic v. Turkey*, App. Nos. 46827/99 & 46951/99, Eur. Ct. H.R., ¶ 97 (2003).

27. *LaGrand Case* (F.R.G. v. U.S.) 2001 I.C.J. 466 (Mar. 2).

28. *Mamatkulov & Abdurasulovic*, App. Nos. 46827/99 & 46951/99, Eur. Ct. H.R., ¶¶ 39-51, 100-5. *See also* *Mamatkulov & Askarov v. Turkey*, App. Nos. 46827/99 & 46951/99, Eur. Ct. H.R., ¶¶ 40-53, 112-24 (2005).

The Court notes that in a number of recent decisions and orders, international courts have stressed the importance and purpose of interim measures and pointed out that compliance with such measures was necessary to ensure the effectiveness of their decisions on the merits.²⁹

The ECHR duly held that it had the power to order provisional measures that had mandatory force.³⁰ This decision was consistent with the practice of the other international courts.

A sixth example is found in *Aguas Argentinas et. al. v. Argentina*, one of several bilateral investment treaty claims launched against Argentina.³¹ In this case, the question arose as to whether the International Centre for Settlement of Investment Disputes (ICSID) Tribunal had the authority to allow certain non-governmental organizations (NGOs) to access the hearings, submit *amicus curiae* briefs, and have unrestricted access to the documents in the case.³² While the Tribunal rejected the NGOs' application to have access to the hearings and deferred a decision on granting the NGOs access to the documents, the Tribunal did permit the NGOs to submit *amicus curiae* briefs.³³ In doing so, the Tribunal referred to the decision of a NAFTA tribunal operating

29. *Id.* ¶ 101.

30. *Mamatkulov & Askarov v. Turkey*, App. Nos. 46827/99 & 46951/99, Eur. Ct. H.R., ¶¶ 118-129 (2005).

31. *Suez, Sociedad General de Aguas de Barcelona v. Argentina*, Case No. ARB/03/19, ICSID (W. Bank) (2007). Since the discontinuance of the proceedings by *Aguas Argentinas SA against Argentina* (see *Aguas Argentinas, SA, Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA v Argentina* (ICSID Case No ARB/03/19, Procedural Order No 1 of 14 April 2006)), this case is now known as *Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA v Argentina* (ICSID Case No ARB/03/19). Regarding the many claims against Argentina commenced under bilateral investment treaties, see also Carlos Ignacio Suarez Anzorena, *Multiplicity of Claims Under BITs and the Argentine Case*, TRANSNAT'L DISP. MGMT., Apr. 2005, at 20.

32. *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal. S.A. v. Argentina*, Case No. ARB/03/19, ICSID (W. Bank), Order on Amicus Curiae (May 19, 2005).

33. *Id.* ¶¶ 7-16.

under the UNCITRAL Rules,³⁴ as well as the practice of WTO panels and the WTO Appellate Body.³⁵

Seventh, in *MOX Plant*, the Tribunal constituted under Annex VII of the United Nations Convention on the Law of the Sea (UNCLOS) faced the question of whether it had the power to grant provisional measures other than those requested.³⁶ Both the text of Annex VII of UNCLOS and the Tribunal's Rules of Procedure are silent regarding provisional measures.³⁷ In addressing the issue, the Tribunal referred to the practice of the ICJ and the ITLOS, holding:

Although the language of article 290 [of UNCLOS] is not in all respects identical to that of article 41 of the Statute of the International Court of Justice, the Tribunal considers that it should have regard to the law and practice of that Court, as well as to the law and practice of ITLOS, in considering provisional measures . . . [A]ccording to article 89, paragraph 5, of the ITLOS Rules of Procedure, it is open to ITLOS to prescribe measures different in whole or in part from those requested. A similar provision is contained in article 75, paragraph 2, of the Rules of Court of the International Court of Justice. The Tribunal, having drawn these provisions to the attention of the parties without comment from either, considers that it is also

34. *Methanex Corp. v. United States*, Decision of the Tribunal on Petitions From Third Person to Intervene as "Amici Curiae," 44 I.L.M. 1345, ¶¶ 31-34 (NAFTA Ch. 11 Arb. Trib.) (Jan. 15, 2001) (decision of the tribunal on petitions from third persons to intervene as "amici curiae") (where the NAFTA Tribunal referred, in turn, to the practice of the Iran-United States Claims Tribunal, the WTO, and also the practice, albeit inconsistent, of the ICJ on receiving *amicus curiae* briefs).

35. *Suez, Sociedad General de Aguas de Barcelona*, Case No. ARB/03/19, ¶ 22. (Referring to "the increased transparency in the arbitral processes of the World Trade Organisation and the North American Free Trade Agreement," the Tribunal ultimately granted the NGOs' petition to submit an *amicus curiae* brief. *Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA v. Argentina* (ICSID Case No. ARB/03/19, Order in Response to a Petition by Five Non-Governmental Organisations of 12 February 2007)). See also *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentina*, Case No. ARB/03/17, ICSID (W. Bank), Order in Response to a Petition For Participation As Amicus Curiae, ¶ 15 (Mar. 17, 2006) (where the Tribunal found support for its power to accept *amicus curiae* submissions "in the practices of NAFTA, the Iran-United States Claims Tribunal, and the World Trade Organisation").

36. *MOX Plant (Ir. v. U.K.)*, Procedural Order No. 3, 42 I.L.M. 1187, 1193 (Perm. Ct. Arb. 2003).

37. *Id.* ¶¶ 41-43.

competent to prescribe provisional measures other than those sought by any party.³⁸

The Award on Jurisdiction of the ICSID Tribunal in *SGS Société Générale de Surveillance SA v. Philippines* provides an eighth example.³⁹ The ICSID Tribunal was faced with the question of whether it had the power to suspend proceedings pending the determination of a relevant legal issue by another judicial body.⁴⁰ In finding that it did have this power, the ICSID Tribunal referred to the decision of the UNCLOS Tribunal in *MOX Plant*. In that case, the tribunal stayed the proceedings before it pending the institution of proceedings by the European Commission against Ireland under article 226 of the Treaty Establishing the European Community.⁴¹

What can be seen from this brief survey is a readiness by international courts to look to the practice of other international courts on issues of procedure and remedies and draw on that practice. This will increasingly lead to a convergence in the jurisprudence of international courts. While a pattern of converging practices does not imply the existence of a completely uniform approach, it does suggest an emerging body of rules to which international courts might refer when their statutes and rules of procedure contain gaps or ambiguities. This emerging body of rules might be termed a "common law of international adjudication." This term is not used to suggest that there is an Anglo-American conspiracy to exert a dominant influence on international dispute settlement proceedings to the detriment of the civilian legal tradition. Rather, it suggests an increasingly homogeneous body of rules applied by international courts relating to procedural and remedial issues in cases where there are *lacunae* in their statutes and rules of procedure. This emerging corpus of rules is being developed through a process of cross-fertilization of principles.

38. *Id.*

39. *SGS Société Générale de Surveillance SA v. Philippines*, ICSID Case No. ARB/02/6, Decision on Jurisdiction (Jan. 29, 2004).

40. *Id.* ¶ 173.

41. *Id.* ¶¶ 171-75. See generally *MOX Plant* 42 I.L.M. See Consolidated Version of the Treaty Establishing the European Community, art. 226, Dec. 29, 2006, C321 O.J. E/1.

III. REASONS FOR THE EMERGING COMMON LAW OF INTERNATIONAL ADJUDICATION

In light of these examples of cross-fertilization, the question arises as to why this is happening. There is a wide range of factors relevant to the emergence of a common approach regarding issues of procedure and remedies. It would be superficial to suggest that each factor is applicable in every situation where an issue arises that might lend itself to the adoption of a common approach. Rather, the relevant factors—of which twelve can be identified—may only be applicable with respect to certain issues of procedure and remedies and before certain international tribunals. It should also be emphasized that each of the twelve factors, which are described in the following paragraphs, are not necessarily self-contained. To varying degrees, overlap exists among them.

A. Similar Drafting of Constitutive Instruments

The first factor relevant to the emergence of a common law of international adjudication is that the constitutive instruments of international courts are sometimes drafted in similar terms. For example, the ITLOS Statute and the Statute of the Court of Justice of the European Communities were, at least in part, based on the ICJ Statute.⁴² The drafters of the ICSID Convention also drew on the ICJ Statute.⁴³ The framers of the Convention for the Protection of Human Rights and Fundamental Freedoms,⁴⁴ the constitutive instrument of the ECHR, did so also.⁴⁵ The ICJ Statute is almost identical to the Statute of the Permanent Court of International Justice (PCIJ).⁴⁶ The Statute of the PCIJ was

42. See Barbara Kwiatkowska, *The Future of the Law of the Sea in Hamburg*, in INT'L LAW & THE HAGUE 750TH ANNIVERSARY 417 (Wybo P. Heere ed., 1999). See also Jürgen Schwarze, *Origins of the European Courts' Statutes and Rules of Procedure in EUROPEAN COURTS: PRACTICE AND PRECEDENTS* 3, 4-5 (Richard Plender, ed., 1997); Richard Plender, *Rules of Procedure in the International Court and the European Court*, 2 EUR. J. INT'L L. 1 (1991).

43. See CHRISTOPH H. SCHREUER, *THE ICSID CONVENTION: A COMMENTARY* 56, 59, 453-54, 545, 745-46, 766-67, 856-57, 869 (2001).

44. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953).

45. See *Loizidou v. Turkey*, App. No. 15318/89, 20 Eur. H.R. Rep. 99, ¶ 67 (1995) (Preliminary objections). The ECHR noted that various provisions of the European Convention had been modelled on the ICJ Statute.

46. See SHABTAI ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920-2005*, 52-76 (Vol. I 2006).

influenced by the constitutive instruments of the first permanent body for the settlement of international disputes, the Convention for the Pacific Settlement of International Disputes of 1899,⁴⁷ and the Convention for the Pacific Settlement of International Disputes of 1907⁴⁸ together with the Draft Convention Relative to the Creation of a Court of Arbitral Justice of 1907.⁴⁹ Given the common origins and similar drafting of these constitutive instruments, similarities in the way these international courts interpret many of their provisions is to be expected.

B. Relevance of Precedent

The second factor occurs when an issue arises in one international court and the resolution is found by looking at how other bodies with similar constitutive instruments have dealt with similar issues. This concept of precedent, or *stare decisis*, encourages judges on international courts to ask whether the issue before them was previously considered.⁵⁰ This is not to say that the doctrine of *stare decisis* is applicable to international law. For example, article 59 of the ICJ Statute makes it clear that it is not,⁵¹ and many international tribunals have expressly stated that they are not bound by previous decisions.⁵² Yet, if the reasoning of one international court is persuasive, that reasoning will often

47. Convention for the Pacific Settlement of International Disputes, *opened for signature* July 29, 1899, 1 BEVANS 230 (entered into force Sept. 4, 1900).

48. Convention for the Pacific Settlement of International Disputes, *opened for signature* Oct. 18, 1907, 1 BEVANS 577 (entered into force Jan. 26, 1910).

49. THE PROCEEDINGS OF THE HAGUE PEACE CONFERENCES: THE CONFERENCE OF 1907 388 (James Brown Scott, ed., Oxford Univ. Press Vol. 1 1920); MANLEY HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE: A TREATISE 109, 122-81 (1934). On the work of the Advisory Committee of Jurists in drafting the PCIJ Statute, see Ole Spiermann, *Who Attempts Too Much Does Nothing Well: The 1920 Advisory Committee of Jurists and the Statute of the Permanent Court of International Justice*, 73 BRIT. Y.B. INT'L L. 187 (2002).

50. See MOHAMED SHAHABUDEEN, PRECEDENT IN THE WORLD COURT 6 (1996).

51. ICJ Statute, *supra* note 18, at art. 59 ("The decision of the Court has no binding force except between the parties and in respect of that particular case.").

52. See Bayindir Insaat Turizm Ticaret Ve Sanayi v. Pakistan, Case No. ARB/03/29, ICSID (W. Bank), Decision on Jurisdiction, ¶ 76 (Nov. 2005) ("The Tribunal agrees that it is not bound by earlier decisions, but will certainly carefully consider such decisions whenever appropriate."); AES Corp. v. Argentina, Case No. ARB/02/17, ICSID (W. Bank), Decision on Jurisdiction, ¶30-3 (Apr. 2005). See also SGS Société Générale de Surveillance SA, ICSID Case No. ARB/02/6, ¶ 97 ("[A]lthough different tribunals constituted under the ICSID system should in general seek to act consistently with each other, in the end it must be for each tribunal to exercise its competence in accordance with the applicable law.").

encourage other international courts to adopt the same approach.⁵³ Sir Hersch Lauterpacht encapsulated this principle most eloquently when he explained that the ICJ, although not bound by the doctrine of precedent, nonetheless follows its own decisions:

The Court follows its own decisions for the same reasons for which all courts—whether bound by the doctrine of precedent or not—do so, namely, because such decisions are a repository of legal experience to which it is convenient to adhere; because they embody what the Court has considered in the past to be good law; because respect for decisions given in the past makes for certainty and stability, which are of the essence of the orderly administration of justice; and (a minor and not invariably accurate consideration) because judges are naturally reluctant, in the absence of compelling reasons to the contrary, to admit that they were previously in the wrong.⁵⁴

While Sir Hersch Lauterpacht was referring to the practice of the ICJ in following its own decisions (and those of its predecessor, the PCIJ), the same consideration is relevant to the practice of international tribunals cross-referring to the jurisprudence of other international courts.

C. Methods for Cross-Fertilization

A third reason for the emergence of commonalities in issues of procedure and remedies is evident in the ability of international courts to adopt approaches to the interpretation of their statutes and rules. This custom permits international courts to take account of the practice of other international tribunals. While international courts are likely to consistently interpret similarly drafted instruments, such courts have also managed to reach similar interpretations from differently worded provisions.⁵⁵ In order to

53. See SHANY, *supra* note 5, at 110-11. See also Elihu Lauterpacht, *The Development of the Law of International Organisations by the Decisions of International Tribunals*, in 152 RECUEIL DES COURS 377, 396-402 (1976).

54. HERSCHE LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* 14 (1958).

55. See Rosalyn Higgins, *A Babel of Judicial Voices? Ruminations from the Bench*, 55 INT'L & COMP. L. Q. 791, 797-98 (2006). See also, *Maffezini v. Spain*, Case No. ARB/97/7, ICSID (W. Bank), Decision on Provisional Measures, ¶¶ 6-9 (Oct. 28, 1999); *Victor Pey Casado & Pres. Allende Found. v. Chile*, Case No. ARB/98/8, ICSID (W. Bank), Decision on Provisional Measures, ¶¶ 17-27 (Sept. 25, 2001); *Tokios Tokeles v. Ukraine*, Case No. ARB/02/18, ICSID (W. Bank), Procedural Order No. 1, ¶ 4 (July 1, 2003); *Tokios Tokeles v. Ukraine*, Case No. ARB/02/18, ICSID (W. Bank), Procedural Order No. 3, ¶¶ 6-7 (Jan.

facilitate such common interpretations, international courts employ certain approaches to treaty interpretation,⁵⁶ although they do not always clarify which of these approaches they rely on in individual cases.⁵⁷

The first of these approaches is the principle of effectiveness in treaty interpretation. This is in accordance with which "[p]articular provisions are to be interpreted so as to give them the fullest weight and effect consistent with the normal meaning of the words and with other parts of the text."⁵⁸ International tribunals rely on this principle in awarding remedies and asserting certain procedural powers.⁵⁹ One example is the power to grant binding provisional measures consistent with the practice of other international judicial bodies.⁶⁰

Second, international courts have adopted an evolutionary approach to interpreting their constitutive instruments. This approach recognizes that certain terms are not static, and their meanings may change with time.⁶¹ It also permits international courts to take account of developments elsewhere.⁶²

Third, international courts have taken account of international judicial practice. International courts do this by referring to article 31(3)(c) of the *Vienna Convention on the Law of Treaties* when interpreting provisions of statutes and rules.⁶³ The Convention provides that in interpreting treaties, "[t]here shall be taken into account, together with the context . . . any relevant rules of international law applicable in the relations between the

18, 2005), n.12; *Occidental Petrol. Corp. v. Ecuador*, Case No. ARB/06/11, ICSID (W. Bank), Decision on Provisional Measures, ¶ 58 (Aug. 17, 2007) (in which the ICSID Tribunals interpreted the word "recommend" consistently with ICJ jurisprudence to mean the same as "order.").

56. See BROWN, A COMMON LAW, *supra* note 8, at 41-53.

57. See also Isabelle van Damme, Treaty Interpretation by the WTO Appellate Body 25 (2007) (unpublished Ph.D. dissertation, University of Cambridge).

58. GERALD FITZMAURICE, THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE 50 (1986).

59. *Id.* at 51.

60. See generally *id.*

61. See generally LASSA OPPENHEIM, 1 OPPENHEIM'S INTERNATIONAL LAW 1282 (Robert Jennings & Arthur Watts eds., 9th ed., 1992). See also *Gabcikovo-Nagymaros Project* (Hung. v. Slov.) 1997 I.C.J. 7, 67-8 (Sept. 25); *Iron Rhine ("IJzeren Rijn") Railway* (Belg. v. Neth.), Award of May 24, 2005, ¶¶ 79-81 (Perm. Ct. Arb. 2005), available at http://www.pca-cpa.org/showpage.asp?pag_id=1155.

62. See generally OPPENHEIM, *supra* note 61.

63. Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, 1155 U.N.T.S. 311, art. 31(3)(c) (entered into force Jan. 27, 1980).

parties.”⁶⁴ Again, this approach has been interpreted as permitting international courts to consider the practice of other international tribunals.

D. Rules Developed in Customary Practice and General Principles of Law

A fourth reason for the adoption of common approaches by international courts is to enable referencing of two well-established sources of judicial procedure and remedies: customary rules developed in international judicial practice and general principles of law.⁶⁵ For instance, in enunciating the widely accepted rule that full reparation is the primary remedy in international law, the PCIJ noted that this was “established by international practice and in particular by the decisions of arbitral tribunals.”⁶⁶ The application of customary rules and general principles of law harmonizes issues of procedure and remedies precisely because they are not derived from any specific dispute settlement regime. Rather, they are derived from rules and principles that are usually susceptible of general application. In applying such rules and principles, international courts will invariably consider the practice of other international tribunals, which leads to the adoption of common approaches to these issues.

E. Existence of Inherent Powers

The ability of international courts to exercise inherent powers is the fifth reason for the emergence of common approaches to

64. *Id.* See also Campbell McLachlan, *The Principle of Systematic Integration and Article 31(3)(c) of the Vienna Convention*, 54 INT'L & COMP. L.Q. 279, 280 (2005); Philippe Sands, *Sustainable Development: Treaty, Custom and the Cross-Fertilisation of International Law*, in INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT: PAST ACHIEVEMENTS AND FUTURE CHALLENGES 39 (Alan Boyle & David Freestone eds., 1999); Philippe Sands, *Treaty, Custom and the Cross-Fertilisation of International Law*, 1 YALE HUM. RTS. & DEV. L.J. 85, 95 (1998).

65. See BROWN, A COMMON LAW, *supra* note 8, at 53-5. See also ROSENNE, *supra* note 46, at 73; Robert Kolb, *General Principles of Procedural Law*, in THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 793 (Andreas Zimmermann et al. eds., 2006); BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL TRIBUNALS 299 (Grotius 1987) (1959); GEORG SCHWARZENBERGER, INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS, VOL. IV: INTERNATIONAL JUDICIAL LAW 584-85 (1986).

66. *Factory at Chorzow (Ger. v. Pol.)*, 1928 P.C.I.J. (ser. A) No. 17, at 47 (May 25).

issues of procedure and remedies.⁶⁷ The constitutive instruments and rules of procedure of international courts do not always confer identical or similar powers on international courts and contain *lacunae*.⁶⁸ If there are gaps on issues of procedure and remedies, international courts might have the ability to fill them by the exercise of their inherent powers to fulfill their functions.

In exercising such powers, which may not be prescribed by the terms of their constitutive instruments or rules of procedure, international courts are likely to refer instinctively to the practice of other international tribunals. For instance, in *Nottebohm*, the ICJ held that its power to determine the extent of its jurisdiction, or *compétence de la compétence*, although contained in article 36(6) of the ICJ Statute, was "a rule consistently accepted by general international law in the matter of international arbitration."⁶⁹ The exercise of inherent powers can also be seen in the decisions of the Iran-United States Claims Tribunal and the IACHR referred to above. The tribunals found they had the power, in certain cases, to revise judgments and awards in light of newly discovered evidence.⁷⁰ Accordingly, the exercise of inherent powers can also result in an international court adopting a common approach found in the practice of other international tribunals.

F. Similar Functions of International Courts and Tribunals

The sixth reason for the emerging common law of international adjudication is that international courts essentially fulfill the same functions.⁷¹ While there are competing conceptions of the different functions of international courts and tribunals, there are two general functions shared by international courts: the settlement of disputes in accordance with law, and the proper administration of international justice. This is not to say that international courts with the same general functions necessarily

67. See BROWN, A COMMON LAW, *supra* note 8, at 55-81; Chester Brown, *The Inherent Powers of International Courts and Tribunals*, 76 BRIT. Y.B. INT'L L. 195, 202 (2005); Paola Gaeta, *Inherent Powers of International Courts and Tribunals*, in MAN'S INHUMANITY TO MAN: ESSAYS ON INTERNATIONAL LAW IN HONOUR OF ANTONIO CASSESE 353, 356 (Lal Chand Vohrar et al. eds., 2003).

68. Brown, *The Inherent Powers of International Courts*, *supra* note 67, at 202.

69. *Nottebohm* (Liech. v. Guat.) 1953 I.C.J. 111, 1119 (Nov. 18).

70. See *supra* p. 224.

71. See BROWN, A COMMON LAW, *supra* note 8, at 229-37; Brown, *The Inherent Powers of International Courts*, *supra* note 67, at 229-37.

share the same specific functions. As noted below, the specific functions of an international court can limit the relevance of another international court's case law to its proceedings.

Individual international courts also might have functions that require them to decide certain issues differently. The fact that international courts share two essential functions helps explain the increasing convergence in jurisprudence. If an international court can identify other international courts with common functions, this arguably makes consideration of the practice of those courts more relevant.

G. Limited Size of the International Bar and International Judiciary

The seventh reason is found in the existence of a distinct group of international lawyers who regularly appear before different international courts. As Professor Cot observed of those appearing before the ICJ:

Le nombre d'avocats qui plaident régulièrement devant la Cour internationale de Justice peut être estimé à une douzaine. J'ai retenu six noms parmi ceux-ci: trois britanniques, un australien, deux français. Un ou plusieurs de ces avocats ont plaidé dans dix-neuf des vingt affaires contentieuses qui ont donné lieu à décision au cours de la décennie écoulée. Je ne connais pas de barreau national si restreint et de monopole mieux gardé que celui-là.⁷²

In addition to this "international bar," a limited number of people make up the "international judiciary." Indeed, many international judges have served on more than one international court.

It is suggested that the relatively small number of international lawyers and judges participating in international dispute settlement proceedings might also contribute to the emerging common law of international adjudication.⁷³ Since international lawyers are frequently in contact with each other, this permits them to exchange ideas related to international adjudication. In the words of Professor Cot:

72. Jean-Pierre Cot, *Le Monde de la Justice Internationale*, in LA JURISDICTION DU DROIT INTERNATIONAL: COLLOQUE DU LILLE 511, 513 (2003).

73. *Id.* at 514.

Ce petit monde vit en symbiose. Juges, agents, avocats, conseils se retrouvent aux mêmes bonnes tables de La Haye. Ils fréquentent les couloirs de la 42^{ème} Rue et singulièrement de la VI^{ème} Commission. Les juges sont eux-mêmes d'anciens conseillers juridiques ou d'anciens avocats, souvent passés par la Commission du droit international.⁷⁴

Since these same international lawyers appear before or sit on different international tribunals, they are likely to bring a common legal experience to their work; procedural experience gained from one international court is likely to be drawn on when appearing before or serving on another such body.

H. Competition among International Courts and Tribunals

The eighth reason for this commonality is that proliferation arguably creates a sense of competition among some international courts. This inter-institutional competition might, in some cases, lead to greater commonality in the approach of international courts to certain issues of procedure and remedies. For instance, an international court may wish to make its forum as attractive as possible to potential litigants, leading to offers of procedural advantages as compared with other international courts within a similar jurisdiction. One example is the ICJ's judgment in *LaGrand* in 2001. In *LaGrand*, the court found that provisional measures under the ICJ Statute were binding.⁷⁵ Although the ICJ's judgment was thoroughly reasoned, it can be speculated that it was at least partly motivated by a desire on the part of the ICJ to remain an attractive forum for cases involving requests for provisional measures. This is especially true given that any provisional measures granted under UNCLOS would definitely be binding in view of the clear language of article 290(6) of that convention.⁷⁶

74. *Id.*

75. *LaGrand Case (F.R.G. v. U.S.)* 2001 I.C.J. at 503. See BROWN, A COMMON LAW, *supra* note 8, at 146-50; Robert Jennings, *The LaGrand Case*, 1 LAW & PRAC. INT'L CTS. & TRIB. 13, 35 (2002); Martin Mennecke & Christian Tams, *LaGrand Case (Germany v. United States of America)*, 51 INT'L & COMP. L.Q. 449, 455 (2002); Xiodang Yang, *Thou Shalt Not Violate Provisional Measures*, 60 CAMBRIDGE L.J. 441, 441 (2001).

76. Some suggest that it was not a "mere coincidence" that the ICJ decision in *LaGrand* followed the express stipulation of the binding nature of provisional measures granted under UNCLOS. See generally Ole Spiermann, *Review of Shabtai Rosenne, Provisional Measures in International Law: The International Court of Justice and the International Tribunal for the Law of the Sea*, 76 BRIT. Y.B. INT'L L. 554 (2005).

There are limitations, however, to the importance of this factor. There is no objective or empirical evidence that inter-institutional competition has had any influence on the decisions of international courts, and in this sense, its significance is difficult to substantiate. Even if this consideration is relevant, the scope of its operation is relatively limited. It can only have some effect in instances where international courts have overlapping jurisdictions such as the ICJ, the ITLOS, and other UNCLOS tribunals. There are many other cases where this consideration does not arise; for instance, the jurisdiction *ratione materiae* and *ratione personae* of the WTO dispute settlement system is different than that of the various international human rights tribunals. In this respect, the ECHR's judgment in *Mamatkulov* in 2003⁷⁷ where it found that its provisional measures had binding force, was arguably not influenced by any sense of inter-institutional competition with the ICJ, the ITLOS, or UNCLOS tribunals. This is because the jurisdiction of these international courts does not overlap. It is therefore safe to conclude that the emergence of commonalities in the jurisprudence of international courts that do not have overlapping jurisdictions is unlikely to have been motivated by inter-institutional competition.

I. Common Practices as a Positive Development

A potential ninth reason for the emerging commonality is an underlying belief in the minds of many international judges that commonality is a positive development. Based on this belief, they exercise procedural and remedial powers more or less consistently with the practice of other international courts. In this sense, some international tribunals might consciously strive to obtain similar outcomes. These efforts might stem from multiple rationales. These include, a desire for systemic coherence in the administration of international justice, a belief that commonality furthers the goal of "security and predictability" in international adjudication,⁷⁸ or even a sense of conformity with the practices of an international court regarded as prestigious within the

77. *Mamatkulov & Abdurasulovic v. Turkey*, App. Nos. 46827/99 & 46951/99, Eur. Ct. H.R., at 32. See also *Mamatkulov & Askarov v. Turkey*, App. Nos. 46827/99 & 46951/99, Eur. Ct. H.R., at 11.

78. See, e.g., Understanding on Rules and Procedures Governing the Settlement of Disputes, *supra* note 13, at art. 3(2).

international legal order, such as the ICJ. Again, while it is difficult to substantiate the importance of this factor without extensive empirical research, this desire for relative consistency in the procedural and remedial aspects of international adjudication could help explain the emergence of increasing commonality.

J. Similar Relationships between International Courts and Litigating Parties

A tenth reason for commonality is the existence, in some cases, of a similar relationship between international courts and the litigating parties before them. If a relationship exists between international courts, such as the ICJ and the ITLOS, and the litigants in the ICJ's case are similar to the parties before the ITLOS, the ITLOS will likely adopt common approaches to procedural and remedial issues. For example, international courts may possess certain coercive powers, such as a power to issue orders for the production of evidence,⁷⁹ or other mandatory orders requiring specific performance.⁸⁰ Even though many international courts possess such powers, some international courts will not exercise them due to deference to the parties.⁸¹ Consider the ICJ, the ITLOS, and the WTO, where the parties before these courts are often sovereign states.⁸² These courts will take into account the parties' status as sovereign powers and deference to the parties will be consistent among those courts. This contrasts with the practice of tribunals constituted under, for instance, the ICSID Convention and the UNCITRAL Rules, which have not demonstrated any reluctance to issue orders directing states to comply with certain procedural rules, such as the production of documents.⁸³

79. See generally BROWN, A COMMON LAW, *supra* note 8, at 104-10.

80. *Id.* at 209-16.

81. For example, many interstate courts are reluctant, where the parties are sovereign states, to order the production of documents, or to issue mandatory or consequential orders as remedies. *Id.* at 105.

82. See, e.g., ICJ Statute, *supra* note 18, at art. 34(1); ITLOS Rules of Procedure, art. 20(1); Understanding on Rules and Procedures Governing the Settlement of Disputes, *supra* note 13, at art. 1(1). Note, however, that under the ITLOS Statute, art. 20(2), the ITLOS is open to entities other than states parties in any case expressly provided for in Part XI of UNCLOS, or in any case submitted pursuant to any other agreement conferring jurisdiction on the ITLOS that is accepted by all parties to that case.

83. See, e.g., Biwater Guaff (Tanzania) Ltd. v. Tanzania, Case No. ARB/05/22, ICSID (W. Bank), Procedural Order No. 1, ¶¶ 104-106 (Mar. 2006); Biwater Guaff (Tanzania) Ltd. v. Tanzania, Case No. ARB/05/22, ICSID (W. Bank), Procedural Order No. 2, ¶¶ 8-9

K. Practice of the Parties in Referring to the Jurisprudence of Other International Courts

An eleventh reason for the emergence of common practices might be found in the fact that the parties to international litigation have pleaded the relevance of the jurisprudence of other international courts.⁸⁴ Although international courts can be presumed to know the law, in accordance with the principle *jura novit curia*,⁸⁵ the submissions of litigants on the exercise of procedural and remedial powers will naturally have some influence on the international court's decision.

L. Norm-Intrinsic Reasons for Common Approaches

Finally, a twelfth relevant factor is that there may be norm-intrinsic reasons for the adoption of common approaches by international courts and tribunals, such as the perceived fairness or utility of the rule in question. This factor, for instance, may have been influential in the various findings by international tribunals on the binding nature of provisional measures⁸⁶ and on the authority of international tribunals to permit NGOs to submit *amicus curiae* briefs in disputes having a public interest element.⁸⁷

(May 2006); CSOB v. Slovakia, Case No. ARB/97/4, ICSIC (W. Bank), Decision of the Tribunal on the Further and Partial Objection to Jurisdiction of Dec. 1, 2000, 251, 254 (2001); Tanzania Electric Supply Co. v. Independent Power Tanzania, Case No. ARB/98/8, ICSID (W. Bank), Award, ¶¶ 43-44 (June 22, 2001); Feldman v. Mexico, Case No. ARB/99/1, 7 ICSID (W. Bank) 327, ¶¶ 27, 33, 36-41 (Dec. 16, 2002); Plama Consortium Ltd. v. Bulg., Case No. ARB/03/24, ICSID (W. Bank), Decision on Jurisdiction, ¶ 16 (Feb. 8, 2005); GAMI Investments, Inc. v. Mexico, Proc. Order No. 1, ¶ 7.6 (Jan. 31, 2003), http://www.naftaclaims.com/disputes_mexico_gami.htm. See also *Howe v. Bank of Int'l Settlements*, 23 R. Int'l Arb. Awards 153, Procedural Order No. 3 (Mar. 2002), Procedural Order No. 5 (Mar. 2002), Procedural Order No. 6 (June 2002), Procedural Order No. 10 (Mar. 2003).

84. BROWN, A COMMON LAW, *supra* note 8, at 233.

85. See, e.g., *Military and Paramilitary Activities (Nicar. v. U.S.)* 1986 I.C.J. 14, 24-5 (June 27); *Fisheries Jurisdiction (U.K. v. Ice.)*, 1974 I.C.J. 3, 9 (Feb. 2). See also *EC-Tariff Preferences* *supra* note 15, ¶ 105; CHENG, *supra* note 65, at 299.

86. E.g., *LaGrand case (Ger. v. U.S.)* 40 I.L.M. 1069, ¶102 (2001).

87. See, e.g., ICISD R. Proc. Arbitration Proceedings 37(2). See also, discussion in *Biwater Gauff (Tanzania) Ltd. v. Tanzania*, Case No. ARB/05/22, ICSID (W. Bank), Procedural Order No. 3, ¶ 122 (Sept. 2006); *Suez, Sociedad General de Aguas de Barcelona S.A. and Interagua Servicios Integrales de Agua S.A. v. Argentina*, Case No. ARB/03/17, Order in Response to a Petition For Participation As Amicus Curiae, ¶ 15; *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentina*, Case No. ARB/03/19; U.S.—Panel Report, U.S.—*Shrimp*, WT/DS58/R (May 15, 1998) (concerning the power of WTO panels to receive *amicus curiae* briefs);

IV. LIMITATIONS TO THE EXISTENCE OF A COMMON LAW OF INTERNATIONAL ADJUDICATION

There are, however, limits to the extent to which the practice of international courts and tribunals in the fields of procedure and remedies can converge. For the avoidance of doubt, this does not suggest that there is now—or ever will be—a set of rules on procedure and remedies that will have universal application before all international courts. Rather, a number of limiting factors can be identified which may curtail the further development of a common law of international adjudication.

The most prominent limitation on the ability of international courts to reach out and engage in a cross-fertilization of rules relating to procedure and remedies lies in the particular drafting of the constitutive instruments and rules of procedure of international courts. Here, the existence of clear provisions, as well as the level of detail on various issues in an international court's statute and rules of procedure, will serve as limiting factors for the emerging body of generally accepted rules. These generally accepted rules should not prevail over special rules that are clearly stipulated in the court's constitutive documents. The DSU of the WTO dispute settlement system is a case on point. The DSU provides for many specific forms of procedure that are different from those procedures before traditional international courts, such as the broader right of third party intervention, and the interim review of panel reports.⁸⁸

The availability of remedies in WTO dispute settlements is another example. While most other international courts have adopted the general rule expressed by the PCIJ in *Factory at Chorzów* that the appropriate remedy at international law is "full reparation,"⁸⁹ WTO panels and the WTO Appellate Body are

Appellate Body Report, *U.S.—Hot Rolled Steel*, WT/DS138/AB/R, ¶ 36, 42 (May 15, 1998) (concerning the power of the WTO Appellate Body to receive *amicus curiae* briefs).

88. Understanding on Rules and Procedures Governing the Settlement of Disputes, *supra* note 13, at arts. 10, 15.

89. *Factory at Chorzow* (Ger. v. Pol.), 1928 P.C.I.J. No. 17, *supra* note 66, at 47. See, e.g., *ADC Affiliate Ltd. and ADC & ADMC Mgmt. Ltd. v. Hungary*, Case No. ARB/03/16, ICSID (W. Bank), Award of the Tribunal, ¶ 479-86 (Oct. 2006); Legal Consequences of the Construction of a Wall in the Palestinian Occupied Territory, Advisory Opinion, 2004 I.C.J. 136, 198 (July 9); *M/V Saiga* (No. 2) (St. Vincent v. Guinea), 120 Int'l L. Rep. 143, 199 (Int'l Trib. L. of the Sea 1999); *Velásquez Rodríguez v. Honduras*, 95 Int'l L. Rep. 306, 314 (Inter-Am. Ct. Hum. Rts. 1989); Papamichalopoulos v.

limited by the clear terms of the DSU. Under the DSU, the main remedy is simply “the withdrawal of the measures concerned,”⁹⁰ and the payment of compensation is not usually envisaged.⁹¹ Although one WTO panel has allowed its remedies to be influenced by the general international law of reparation,⁹² this is arguably limited to certain disputes under the Subsidies and Countervailing Measures Agreement and possibly, the Antidumping Agreement.⁹³ In the majority of WTO disputes, reparation will be unavailable.⁹⁴

A second limiting factor on the development of a common law of international adjudication is that international courts may have their own specific agendas and functions.⁹⁵ These specific functions can serve to limit—or enhance—an international tribunal’s scope to exercise certain procedural powers. For example, if an international court has a constitutional function within a specific regime, as evidenced by a power to render advisory opinions in addition to its contentious jurisdiction, this might suggest that it will be prepared to take account of wider community interests and to accept *amicus curiae* briefs. Arbitral tribunals constituted on an *ad hoc* basis for individual disputes, on the other hand, may be less likely to assert procedural powers in

Greece, 330-B Eur. Ct. H.R. (ser. A) at 59-60 (1995); *Amoco Int’l Fin. Corp. v. Iran*, 15 Iran-U.S. Cl. Trib. Rep. 189, 258 (1987).

90. Understanding on Rules and Procedures Governing the Settlement of Disputes, *supra* note 13, at art. 3(7).

91. Although DSU, art. 3(7) refers to “compensation,” this does not have the same meaning as in general international law. Rather than meaning “an indemnity payment to repair damage or harm caused by an unlawful act,” it is a prospective measure, as it offers relief for harm that the complainant will probably suffer pending the implementation by the defendant of the WTO Panel’s or WTO Appellate Body’s recommendations. Marco Bronckers & Naboth van den Broek, *Financial Compensation in the WTO: Improving the Remedies of WTO Dispute Settlement*, 8 J. INT’L ECON. L. 101, 102-103 (2005). See also BROWN, A COMMON LAW, *supra* note 8, at 218-19; Patricio Grané, *Remedies Under WTO Law*, 4 J. INT’L ECON. L. 755, 762 (2001); DAVID PALMETER & PETROS C. MAVROIDIS, *DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION* 167 (1st ed. 1999).

92. Panel Report, *Australia—Subsidies Provided to Producers and Exporters of Leather*, 951, WT/DS126/R (May 25, 1999).

93. Agreement on Subsidies and Countervailing Measures, Apr. 15 1994, 1869 U.N.T.S. 14; Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, *opened for signature* Apr. 15, 1994, 1868 U.N.T.S. 201.

94. See, e.g., Bronckers & van den Broek, *supra* note 91, at 101-102, 106.

95. Charney, *Multiple International Tribunals*, *supra* note 4, at 371.

furtherance of any broader public function other than the settlement of the dispute.⁹⁶

A third issue which may have a limiting influence on the development of a common law of international adjudication is the relationship between each particular international court and the parties litigating before it. To clarify, this is a factor that works both ways: if a practice or procedure is applied before an international court where there is considerable deference displayed by the court towards the parties, a similar procedure is likely to be applied before other international tribunals where a similar type of relationship exists; if the relationship between the court and the parties is different, the court could be less inclined to adopt the same approach.

Finally, one consideration that might be taken into account is whether it is indeed desirable from a normative viewpoint that the procedures and remedies applicable before different international courts should be the same. The practices of domestic courts are instructive in this area. Different courts at the national level have differing procedures, such as the varying degrees of formality that exist between family law proceedings involving children, on one hand, and civil litigation before the High Court, on the other.

These procedural differences are seen as desirable. An illustration can be found in Lord Woolf's report on the English civil litigation system, *Access to Justice*, published in 1996.⁹⁷ In chapter 19, titled *Specialist Jurisdictions*, Lord Woolf stated, "In chapter 26 of my interim report I stressed that the same general principles, rules and procedures need to apply as far as possible throughout the system."⁹⁸ Nevertheless, he recognized the value of different procedures for certain matters. In his recommendations, he observed: "A number of the special rules for intellectual property, Chancery and Admiralty proceedings should be

96. Note, however, a trend towards facilitating the greater participation of non-parties in international arbitration proceedings, as was recognized by the ICSID Tribunal in *Biwater Gauff Ltd.*, Case No. ARB/05/22, Procedural Order No. 3, ¶ 122, and as is evidenced in the inclusion, as of 10 April 2006, of the new article 37(2) of the ICSID Arbitration Rules, which permit the submission of "non-disputing party" briefs. See also Loukas Mistelis, *Confidentiality and Third Party Participation*, 21 ARB. INT'L 211, 221-23 (2005).

97. LORD WOOLF, *ACCESS TO JUSTICE: FINAL REPORT* (1996), available at <http://www.dca.gov.uk/civil/final/index.htm>.

98. *Id.* at ch. 19 ¶ 1.

retained.”⁹⁹ In addition to the perceived value of these differences which can be found in domestic court systems, alternative methods of dispute resolution, such as mediation, arbitration, adjudication, and expert determination, are increasingly popular for certain types of disputes at the domestic level.¹⁰⁰ These have been developed precisely because it was desirable to have different procedures.

Likewise, there are arguably desirable limits to the increasing convergence in procedures and remedies before international tribunals. The differing functions of various international courts, together with the difference in the types of parties appearing before different international courts,¹⁰¹ have given rise to differing approaches to certain issues. It is arguably beneficial that there is broad agreement on issues such as the power of international courts to order an expert report, the binding nature of provisional measures, and the availability of compensation for harm to personal property. Nevertheless, it is less clear that international tribunals should all apply the same standard of proof to differing claims such as an allegation of state complicity in torture¹⁰² and a claim made in a boundary dispute, where there is a lack of evidence that the *uti possidetis* line was in a certain location.¹⁰³ Accordingly, while it is not a limitation in itself, the desirability of a common law of international adjudication on all issues of procedure and remedies is a question which nonetheless places some limitations on its further development.

V. CONCLUSION

This review of the practice of international courts on issues of procedure and remedies reveals that there is a discernible

99. *Id.* at Recommendations.

100. See, e.g., ALAN REDFERN ET AL., *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 35-46 (4th ed. 2004).

101. Some international courts are designed to confer standing on individuals and corporate entities (such as human rights courts and investment treaty tribunals) whilst others are solely designed for the participation of states (such as the ICJ, the ITLOS, and the WTO dispute settlement system). See ICJ Statute, *supra* note 18. See also Understanding on Rules and Procedures Governing the Settlement of Disputes, *supra* note 13.

102. E.g., *Velásquez Rodríguez v. Honduras*, 1989 Inter-Am. Ct. H.R. (ser. C) No. 7, at 285 (July 21, 1989).

103. E.g., *Land, Island and Maritime Frontier Dispute (El Sal. v. Hond.)*, 1992 I.C.J. 351, 506 (Sept. 11).

tendency for international courts to reach out and consider the practice of other international tribunals. The argument presented in this article is that this is resulting in the emergence of what can be called a "common law of international adjudication." This does not mean, however, that international courts follow each others' decisions all of the time or on every single issue; the different factors at play, as described in this article, mean that some issues are more likely to give rise to common approaches than others. Nonetheless, this cross-fertilization of principles has resulted in broad agreement among international judicial bodies on a range of issues from procedure to remedies.

The emerging common law of international adjudication is a noteworthy development with significant practical and theoretical implications. From a practical point of view, the implications relate not only to the resolution of procedural issues which already arise before many international courts, but also to other issues with which international courts are likely to be confronted and for which their statutes and rules of procedure make no clear provision. Indeed, with the increasing volume of international litigation—particularly before the European Court of Human Rights and also in the field of investment treaty arbitration—international tribunals are being confronted with new and challenging procedural issues, such as the regulation of parallel proceedings and the launching of claims that could be regarded as an abuse of process. The willingness of international courts to refer to the practice of other international tribunals can serve to assist them in finding answers to these issues, and in this sense, the emerging common law of international adjudication can have some prescriptive effect.

The emergence of common standards in international procedure also has theoretical implications. If there is an emerging common law of international adjudication, this might result in answers to broader questions concerning the coherence—or compartmentalization—of the international legal order. It is well known that international courts do not exist as part of a formal system, due to the notable absence of structural and hierarchical connections. But the emergence of common approaches to questions of procedure permits the suggestion that despite the absence of formal links, international courts do not operate as self-contained regimes. Rather, they regard themselves as forming part of a community of international courts. In this sense, the

converging practices of international courts on procedural issues can have positive implications for the further development of the international legal system.

